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No. 80-1345

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

KAISER STEEL CORPORATION,
Petitioner,

v.

JULIUS MULLINS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF AMICUS CURIAE OF MID-AMERICA LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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BRIEF AMICUS CURIAE OF MID-AMERICA LEGAL FOUNDATION IN SUPPORT OF PETITIONER

This brief in support of petitioner is submitted with the written consent of counsel to both parties filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

Mid-America Legal Foundation ("Mid-America") was organized in 1975 as an Illinois not-for-profit corporation to engage in non-partisan legal research, study, and analysis for the benefit of the general public as to the effect of evolving concepts of law on our democratic institutions and to provide legal representation on matters of public interest at all levels of the judicial process. Mid-America takes special interest in questions of law of a national scope that originate in or have a direct effect on the Mid-America region.

Mid-America has an interest in this case because the decision below is at odds with fundamental goals of national labor relations policy. That policy seeks to eliminate unfair labor practices which impair the interest of the public in the free flow of commerce and to encourage the resolution of labor disputes through collective bargaining. By precluding employers from raising the defense that a provision in a collective bargaining agreement violates Section 8(e) of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 158(e) (1976), the decision below means that at least some contract provisions that violate Section 8(e) would be upheld. Moreover, by denying employers the right to raise the illegality defense, the court of appeals' decision would impede the collective bargaining process by deterring employers from signing collective bargaining agreements that contain provisions of questionable legality, thereby increasing the likelihood of impasse and economically damaging strikes. If employers did sign agreements containing clauses of suspect legality, they would be forced to resort to litigation to preserve their rights.

In a broader context, Mid-America has an interest in this case because of its potential impact on the enforceability of contracts in general. The public has a reasonable expectation that courts will not lend their hand to the enforcement of illegal contracts, including contracts that violate the antitrust laws. This expectation is undermined by the decision below, which would make the courts parties to the carrying-out of unlawful activity by declining to entertain illegality defenses and, in effect, refraining from inquiring into the consequences of their judgments.

SUMMARY OF ARGUMENT

I.

This Court has long recognized that the illegality of a contract under the Sherman Act is a good defense in an action to enforce that contract. *Bement* v. *National Harrow Co.*, 186 U.S. 70, 88 (1902). In applying this rule, courts have distinguished between those cases in which the very contract provision which is sought to be enforced is allegedly illegal and cases in which the contract sought to be enforced is merely collateral to an allegedly illegal scheme. The decision below, which ignores this distinction, was based on an erroneous interpretation of *Kelly* v. *Kosuga*, 358 U.S. 516 (1959). As properly applied to this case, *Kelly* requires that Kaiser Steel Corporation ("Kaiser") be permitted to raise its antitrust illegality defense because the purchase-of-coal provision that the Trustees seek to enforce is precisely that provision which Kaiser contends is illegal.

II.

The court of appeals held that Kaiser could not raise the defense that the purchase-of-coal provision is an illegal "hot cargo" clause that violates Section 8(e) of the LMRA. In so doing, the court disregarded the unambiguous directive of Section 8(e) that "hot cargo" clauses are "unenforcible and void." Denial of the Section 8(e) illegality defense is directly contrary to the statutory mandate because it places courts in the position of enforcing contract provisions that are "unenforcible and void."

III.

National labor relations policy seeks to promote industrial peace and the free flow of commerce by encouraging the resolution of disputes between labor and management in the collective bargaining process. The decision below is inconsistent with these salutory purposes because it

would encourage employers to bargain to impasse and precipitate damaging strikes rather than to allow provisions of suspect legality to be included in collective bargaining agreements.

If an employer ultimately determined that in order to avert or end a strike it was necessary to include a provision of suspect legality in a collective bargaining agreement, he would, under the court of appeals' decision, be forced to resort to litigation to preserve his illegality claim. The option of mutually forbearing from enforcing or challenging the suspect provision, thereby avoiding unnecessary litigation, would be lost.

ARGUMENT

I. THE ILLEGALITY OF A CONTRACT PROVISION UNDER THE ANTITRUST LAWS IS A VALID DEFENSE IN AN ACTION TO ENFORCE THAT PROVISION.

The court of appeals' decision that the district court was not obliged to entertain Kaiser's antitrust illegality defense directly contravenes the teachings of this Court. As early as 1902, the Court stated that "any one sued upon a contract may set up as a defence that it is a violation of [the Sherman Act], and if found to be so, that fact will constitute a good defence to the action." *Bement* v. *National Harrow Co.*, 186 U.S. 70, 88 (1902).[1]

In applying the rule that the illegality of a contract or particular provision thereof under the antitrust laws

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[1] This rule is a natural outgrowth of the principle that courts may not enforce unlawful contracts. In McMullen v. Hoffman, 174 U.S. 639, 654 (1899), the Court stated:

> The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract.

is a valid defense,[2] courts have distinguished between (1) cases in which the contract itself is violative of the antitrust laws, and (2) cases in which the contract is merely collateral or ancillary to an illegal scheme.[3] This distinction proved to be critical in *Kelly* v. *Kosuga*, 358 U.S. 516 (1959), which the court of appeals found to be dispositive.

In *Kelly*, the parties entered into a contract for the sale of onions. This contract was distinct from another agreement entered into by the parties to the action and various third parties whereby they all agreed to refrain from delivering any onions on the futures market. The purpose of the nondelivery agreement was to fix the price of onions. The seller tendered the onions pursuant to the valid sales agreement, but the buyer paid for only a portion of them. When the seller sued for the unpaid purchase price, the buyer interposed the defense that the sale was made pursuant to an agreement that violated the Sherman Act. In upholding the district court's grant of summary judgment in favor of the seller, this Court clearly distinguished between the agreement for the sale of the onions, which was the subject of the suit, and the illegal nondelivery agreement that the buyer had sought to raise as a defense. The Court held:

> [W]hile the nondelivery agreement between the parties could not be enforced by a court, if its unlawful character under the Sherman Act be assumed,

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[2] Continental Wall Paper Co. v. Louis Voight & Sons Co., 212 U.S. 227 (1909); Sola Elec. Co. v. Jefferson Elec. Co., 317 U.S. 173 (1942); Farbenfabriken Bayer A.G. v. Sterling Drug, Inc., 307 F.2d 207 (3d Cir. 1962), *cert. denied*, 372 U.S. 207 (1963); Associated Press v. Taft-Ingalls Corp., 340 F.2d 753 (6th Cir.), *cert. denied*, 382 U.S. 820 (1965); Tire Sales Corp. v. Cities Serv. Oil Co., 637 F.2d 467 (7th Cir. 1980).

[3] *See, e.g.*, Connolly v. Union Sewer Pipe Co., 184 U.S. 540, 549 (1902).

> it can hardly be said to enforce a violation of the Act to give legal effect to a completed sale of onions at a fair price.

Id. at 521.

Thus the Court confirmed that contract provisions that violate the Sherman Act will not be enforced, for to enforce them would be "to make the courts a party to the carrying out of . . . the very restraints forbidden by the Sherman Act." *Id.* at 520. It also held that lawful contracts which are separable from an agreement that violates the antitrust laws are enforceable:

> [W]here, as here, a lawful sale for a fair consideration constitutes an intelligible economic transaction in itself, we do not think it inappropriate or violative of the intent of the parties to give it effect even though it furnished the occasion for a restrictive agreement of the sort here in question.

Id. at 521.

The case at bar presents essentially the same elements as in *Kelly*, with one critical difference that mandates a different result; the roles of the legal and illegal contract provisions are the reverse of those in *Kelly*. Here the purchase-of-coal provision that the Trustees seek to enforce is precisely that provision which Kaiser alleges to be violative of the Sherman Act; in *Kelly*, it was the lawful contract for the sale of onions whose enforcement was sought. The lawful portions of the 1974 collective bargaining agreement are not at issue in this litigation, just as the unlawful nondelivery agreement was not the subject of the contract action in *Kelly*, although the defendant there attempted to interpose it as a defense.

The application of the two-pronged holding of *Kelly* to the instant set of facts dictates the proper result here. *Kelly* permits the enforcement of the lawful portions of the collective bargaining agreement, which indeed have

already been performed, but makes it clear that the purchase-of-coal clause "could not be enforced by a court, if its unlawful character under the Sherman Act be assumed . . . ." *Id.* If a district court may not enforce the purchase-of-coal provision, then, *a fortiori*, it may not simply disregard the antitrust illegality defense.

The court of appeals has turned *Kelly* on its head by focusing on the result of the case—rejection of the antitrust illegality defense—rather than the applicable legal principle. In doing so, the court of appeals apparently made the erroneous assumption that courts are precluded from enforcing only contract provisions that constitute facial violations of the antitrust laws and have no obligation to inquire into the anticompetitive purposes and effects of allegedly illegal provisions. *Mullins* v. *Kaiser Steel Corp.*, 642 F.2d 1302, 1310 n.7 (D.C. Cir. 1980). This failure to look beyond the face of an allegedly unlawful contract provision could make the courts parties to the enforcement of illegality, which is precisely what *Kelly* prohibits.[4]

The court of appeals also misconstrued *Kelly* by suggesting that enforcement of the purchase-of-coal provi-

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[4] Cases decided both prior to and subsequent to *Kelly* make it clear that once it is established that the contract provision in question is itself the source of the alleged illegality, courts are obliged to look into the substance of those allegations. Sola Elec. Co. v. Jefferson Elec. Co., *supra*, 317 U.S. at 177 ("[P]etitioner may assert the illegality of the price-fixing agreement and may offer any competent evidence to establish its illegality."); Tire Sales Corp. v. Cities Serv. Oil Co., *supra*, 637 F.2d at 477 ("[I]t was premature to grant summary judgment" denying an antitrust illegality defense asserted against a counterclaim "until plaintiff's antitrust allegations are finally resolved after a full trial."); Associated Press v. Taft-Ingalls Corp., *supra*, 340 F.2d at 764 (Although there was "no tying arrangement . . . spelled out expressly in the contract between the parties," the Court looked to the facts to find a violation of the Sherman Act and upheld the antitrust illegality defense.).

sion would merely bring about what the court deemed to be the lawful result of requiring that payments be made to the funds. 642 F.2d at 1310. This assertion disregards Kaiser's contention that enforcement of the provision would consummate its illegality by imposing a penalty on Kaiser.[5] Such enforcement also would tend to perpetuate the anticompetitive consequences of a substantially identical provision that is included in the recently ratified contract between the United Mine Workers of America and the Bituminous Coal Operators' Association.[6] A decision which made it clear to signa-

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[5] The court of appeals' approach erroneously suggests that a court could enforce a provision that violated the antitrust laws once the contract in question had run its course. Whether or not a court becomes a party to the enforcement of an unlawful agreement cannot logically depend on the timing of the enforcement action. Consider, for example, the following possibility arising out of the facts of *Kelly* itself. Suppose the nondelivery agreement in *Kelly* were in existence and that party *A* learned that party *B* intended to violate that specific illegal agreement (not the valid agreement for the sale of onions) by delivering onions on the futures market. In an action by *A* to enforce the contract by having the court enjoin *B* from delivering the onions on the futures market, *B*'s antitrust illegality defense clearly would prevail because enforcement of the contract by the court would give rise to "one of the very restraints forbidden by the Sherman Act," 358 U.S. at 520—a restriction of the onion trade. Assume, however, that *B* delivered the onions on the futures market before *A* could learn of it and that *A* subsequently brought a contract action seeking damages for breach of their nondelivery agreement. Enforcement of the contract by the court would not bring about a restraint in the onion trade but it would surely consummate the unlawful agreement under judicial auspices. The defense of antitrust illegality undoubtedly would be upheld in both situations. *See* McMullen v. Hoffman, *supra*, 174 U.S. at 660; Farbenfabriken Bayer A.G. v. Sterling Drug, Inc., *supra*, 307 F.2d at 209; Associated Press v. Taft-Ingalls Corp., *supra*, 340 F.2d at 769.

[6] The National Bituminous Coal Wage Agreement of 1981 provides in Article XX, Section (d)(1)(v) that:

> [E]ach signatory Employer shall . . . contribute to the Trusts . . . amounts . . . on each ton of . . . bituminous coal after

tories of the current agreement that they would be liable for purchase-of-coal payments if they bought coal from non-signatory companies would surely deter some of the former companies from purchasing from the latter. Thus, enforcement of the clause would effect both of the anti-competitive consequences alleged by Kaiser. *Kelly* cannot be read to condone such a result.

The court of appeals' misapplication of *Kelly* threatens to undermine the established principle that courts will not enforce contract provisions that violate the antitrust laws and would deprive future litigants of the only realistic opportunity they might have to raise a legitimate defense of antitrust illegality. Such a result would not only be unfair in this and other individual cases that might arise, but it would undermine the integrity of the antitrust laws themselves. As this Court has stated:

> [T]he thrust of the antitrust laws cannot be avoided merely by claiming that the otherwise illegal conduct is compelled by contractual obligations. Were it otherwise, the antitrust laws could be nullified. Contractual obligations cannot thus supercede statutory imperatives.

United States v. *Loew's, Inc.*, 371 U.S. 38, 51 (1962).

II. BECAUSE CONTRACT PROVISIONS THAT VIOLATE SECTION 8(e) OF THE LMRA ARE "UNENFORCIBLE AND VOID," SECTION 8(e) PROVIDES A VALID DEFENSE TO A CONTRACT ENFORCEMENT ACTION.

In refusing to allow Kaiser to assert the defense that the purchase-of-coal provision is an illegal "hot cargo"

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production by another operator, procured or acquired by such Employer for use or for sale on which contributions to the appropriate Trusts as provided . . . have not been made . . . .

Settlement was reached by the bargaining parties on May 28, 1981, and the agreement was ratified by the rank and file on June 6, 1981.

clause that violates Section 8(e) of the Labor-Management Relations Act, 29 U.S.C. § 158(e) (1976), the court of appeals disregarded an unmistakeable statutory directive.[7] Section 8(e) provides that any agreement entered into between a labor organization and an employer that contains a "hot cargo" clause "shall be to such extent unenforcible and void." The meaning of this phrase is unambiguous and direct:[8] "hot cargo" clauses are void at their inception and unenforceable by the courts since they cannot create legally cognizable duties.

This Court is well versed in construing the language of statutes that provide that certain contract provisions are "void." In *Transamerica Mortgage Advisors, Inc. (TAMA)* v. *Lewis*, 444 U.S. 11 (1979), the plaintiff shareholder of a real estate investment fund sought an implied right of action to rescind an investment advisers contract under Section 215 of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-15 (1976). Section 215 provides that contracts whose formation or performance would violate the Act "shall be void . . . as regards the

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[7] Mid-America contends that the language of the statute itself is dispositive of the Section 8(e) issue and mandates reversal of the court of appeals. Mid-America notes, however, that Kaiser treats this particular issue more fully in its brief and Mid-America concurs with the positions regarding Section 8(e) presented therein.

[8] There is hardly a more basic principle of statutory construction than that enunciated in Caminetti v. United States, 242 U.S. 470, 485 (1917); "the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms." In such a case, "the rules which are to aid doubtful meanings need no discussion." *Id.* Repeatedly this Court has relied on this principle and has most recently stated: "'[W]hen we find the terms of a statute unambiguous, judicial inquiry is complete,' unless unusual circumstances are present." United Ass'n of Journeymen v. Local 334, 49 U.S.L.W. 4755, 4759 (1981) (Burger, C.J. dissenting), citing Rubin v. United States, 49 U.S.L.W. 4103, 4104 (1981).

rights of" the violator and knowing successors in interest. This Court held that this statutory language implies a right to relief in federal court:

> [W]e conclude that when Congress declared in § 215 that certain contracts are void, it intended that the customary legal incidents of voidness would follow, including the availability of a suit for rescission or for an injunction against continued operation of the contract, and for restitution.

Id. at 18 (footnote omitted).

In reaching its conclusion, the Court emphasized that even if the term "void" were given its narrowest possible reading, Section 215 could be raised defensively in a contract enforcement action:

> By declaring certain contracts void, . . . [a]t the very least Congress must have assumed that § 215 could be raised defensively in private litigation to preclude the enforcement of an investment advisers contract.

Id.[9]

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[9] In *Transamerica*, this Court reached its conclusion without the aid of legislative history since the history was silent on this point. The legislative history of Section 8(e) is not silent and leaves absolutely no doubt that the authors of Section 8(e) intended what the language literally dictates. Congressman Griffin, the sponsor of the House bill, stated that "[Section 8(e)] not only makes it an unfair labor practice to enter into a 'hot cargo' agreement, but also makes it clear that such contracts are void and unenforcible." National Labor Relations Board, 2 Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, at 1523 (1959). Similarly, Senator Goldwater described Section 8(e) as rendering "hot cargo" provisions "unenforcible and void *for all purposes*." (Emphasis added.) He further emphasized that "[i]t is unlawful for either party to . . . enter into it . . . or to live up to it even if his refusal to do so is in breach of a voluntary agreement . . . and finally, such breach does not constitute a good cause of action in a suit at law . . . or to secure specific performance of the agreement." *Id.* at 1857.

Such a reading is entirely consistent with Justice Stewart's understanding of the language of Section 8(e) itself:

> Since § 8(e) provides that any prohibited agreement is "unenforcible and void," any union effort to . . . compel the neutral employer to comply with his purely voluntary agreement would obviously be unavailing.

Connell Construction Co. v. *Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 649 n.9 (1975) (Stewart, J. dissenting). No members of the majority in *Connell* questioned Justice Stewart's reading of Section 8(e). In light of the intervening *Transamerica* decision there is no basis for doing so now.

The plain language of Section 8(e) required the court of appeals to acknowledge that "[t]he existence of the statutory directive that 'hot cargo' clauses are 'unenforcible and void' surely *must be taken into account.*" 642 F.2d at 1314. (Emphasis added.) Its method of doing so, however, was merely to suggest that courts, while prohibited from enforcing secondary boycotts contemplated by such illegal provisions, are free to enforce the payment of penalties designed to foster such boycotts:

> In short, by making "hot cargo" clauses "unenforcible and void," Congress intended to prevent unions from compelling through judicial enforcement of collective bargaining agreements the very conduct that the union could not compel by its economic might. Whether Congress meant anything more than that is not apparent from the words it used.

Id. at 1315. This argument collapses under the weight of its own implausibility. The statute makes no distinction between enforcing the boycott and enforcing payments that are designed to implement such boycotts. The court of appeals not only gave its own peculiar gloss

to the statutory language, but it also failed to consider that Kaiser's payment under the purchase-of-coal clause is alleged to be one form of harm from which a "neutral employer" like Kaiser—one who is not the target of the alleged secondary boycott activity—is protected by Section 8(e).[10] If a court order requiring that *A* pay *B* certain sums pursuant to a provision in a contract between them does not constitute enforcement of that contract, we are wholly at a loss to speculate what contract enforcement might be.

The court of appeals' approach to Kaiser's Section 8(e) claim erroneously suggests that a court will not be implicated in the enforcement of "hot cargo" provisions if it ignores their alleged illegality. The courts are simply not at liberty to disregard the plain language of statutes and the manifest effects of their own judgments.

III. ADOPTION OF THE COURT OF APPEALS' DECISION WOULD IMPEDE THE COLLECTIVE BARGAINING PROCESS AND WOULD PROMOTE UNNECESSARY AND DUPLICATIVE LITIGATION.

The most troublesome aspect of the court of appeals' decision is its disruptive impact on national labor policy and judicial administration. If permitted to stand, the decision below would have two dramatically adverse consequences. First, it would foster increased levels of economic upheaval occasioned by collective bargaining impasses and strikes. Second, it would encourage employers to initiate unnecessary litigation to test contract provisions that might otherwise go unenforced.

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[10] *See* National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 624-35, 645 (1967), where this Court repeatedly noted that the central theme of Section 8(e) is to protect "neutral" employers from being burdened by "hot cargo" clauses which have the effect of placing the "neutral" employers in the middle of the union's dispute with other parties.

A principal goal of national labor relations policy is to create an atmosphere conducive to the establishment of agreements between the parties and the promotion of industrial peace. As stated in Section 101 of the Labor-Management Relations Act, 29 U.S.C. § 151 (1976):

> It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining . . . .

In a similar vein, this Court has stated that "[o]ne of the primary purposes" of federal labor law "is to promote the peaceful settlement of disputes by subjecting labor-management controversies to the mediatory influence of negotiations." *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 211 (1964). The court of appeals' decision is contrary to this purpose because it would create new and potentially insurmountable problems for employers negotiating collective bargaining agreements that contain provisions of suspect legality.

Courts have recognized that one of the ways of fostering industrial peace is to allow parties to the collective bargaining process to negotiate regarding the inclusion of provisions whose legality may be questioned by one of the parties. For example, in *United Electrical, Radio & Machine Workers of America* v. *NLRB*, 409 F.2d 150 (D.C. Cir. 1969), the employer was charged with failing to bargain in good faith for proposing a novel contract term that the union alleged to be illegal. The court held that insistence on the term in question did not constitute an unfair labor practice, and added:

> Time may prove the Company's legal hypotheses misconceived. . . . All this proves is that legal forecasting like meteorological forecasting, is an inexact science.

> . . . Where either an employer or a union has made a novel proposal which it could reasonably believe would prove enforcible, it would seem neither fair nor desirable to make the duty to bargain in good faith turn on a decision as to the proposal's ultimate enforcibility. Such a test would mean that the parties would have either to avoid innovative proposals, or to be sufficiently clairvoyant to guess the eventual resolution of difficult and open questions of law.

Id. at 159.[11]

In holding that a district court may not entertain illegality defenses in contract enforcement actions, the court of appeals has made the position of the employer in the collective bargaining process decidedly perilous. The risks to the employer of allowing a provision which he believes to be unlawful to be included in the agreement are substantial, as Kaiser can attest. His incentive, therefore, would be strenuously to avoid the inclusion of the legally suspect provision. Thus a contract term of questionable legality would likely become a significant sticking point in contract negotiations. Not only would the bargaining process become protracted and more complicated, but the risk of ultimate impasse and economically damaging strikes would be increased.

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[11] Cases in which bargaining for an illegal provision to impasse is found to be a violation of the party's duty to bargain in good faith under Sections 8(a)(1) and (5), 8(b)(3) and 8(d) of the LMRA do not address the issue of negotiating for provisions of suspect legality. *See* NLRB v. Amalgamated Lithographers of America (IND.), 309 F.2d 31, 42 (9th Cir. 1962), *cert. denied*, 372 U.S. 943 (1963); NLRB v. International Longshoremen's & Warehousemen's Union, Local No. 13, 549 F.2d 1346, 1354 (9th Cir.), *cert. denied*, 434 U.S. 922 (1977). For a party to be charged with this kind of violation, there must be some prior determination that the clause itself is illegal. Neither Sections 8(a)(1) and (5), 8(b)(3) and 8(d) nor the cases that construe them give any substantive guidance to a negotiating party who is faced with a clause that is not illegal on its face but is of questionable legality.

An employer who was unable to make any headway against the union in negotiations, or who was unwilling to incur the massive costs of impasse and strike, might ultimately decide to sign the collective bargaining agreement, despite its inclusion of the suspect provision. At this point, under the court of appeals' decision, the employer would be transformed into an involuntary plaintiff, for if he did not affirmatively assert the illegality of the provision in question, he would never have an opportunity to raise his claim. This forced litigation could be wasteful and ineffectual.

The perceived necessity of resorting to litigation virtually precludes the possibility that both the employer and the union might refrain from performing and enforcing the suspect provision. Mutual forbearance involves neither litigation nor its associated costs; it has heretofore been regarded as one of the incidents of the freedom of contract. By making the employer's forbearance the equivalent of surrendering his legal position, the court of appeals' decision virtually assures that unnecessary litigation would result.

Another disadvantage of requiring employers to pursue their illegality claims affirmatively or forsake them entirely is strikingly illustrated by the factual context of this case. Where an employer like Kaiser asserted that the contract provision in question violates both the labor laws and some other federal statute, like the Sherman Act, he might have to resort to multiple forums to preserve his rights. Under the court of appeals' decision, for example, Kaiser would have been obliged to raise its Section 8(e) argument before the National Labor Relations Board ("NLRB") and to raise its Sherman Act claims in a federal court suit. Such a result is surely less efficient than raising both claims simultaneously as defenses to a contract enforcement action.

Moreover, even if the employer took the initiative and instituted the necessary proceedings, there is a substantial likelihood, at least in the context of a Section 8(e) claim, that the legality of the provision could not be fully assessed. Section 8(e) prohibits contracts which require one employer to cease doing business with another employer. In enforcing this prohibition, the courts have distinguished between "union standards" clauses which preserve unit work and standards, and "union signatory" clauses which further union goals generally, holding the former to be legal and the latter to be illegal. *National Woodwork Manufacturers Association* v. *NLRB*, 386 U.S. 612 (1967). Often, however, this distinction cannot be made on the basis of the language of the contract provision itself, but rather requires reference to the circumstances under which enforcement is sought.[12] Because evidence of the circumstances under which enforcement is sought is not likely to be available at the outset of the contract term when the employer would be forced to institute its challenge, the NLRB or the court would be able to find illegal only a contract provision which on its face has a secondary objective. In the situation where the secondary objective is revealed not on the face of the provision but in the manner and circumstances under which enforcement is sought, the tribunal would be forced to uphold the legality of the terms of the provision but defer decision on the legality of the provision as applied until such time as the union sought enforcement. Such a deferment, of course, would place the parties in the same position in which the Court finds them today.

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[12] Even a seemingly lawful "work preservation" clause may, in certain circumstances, provide the basis for illegal secondary activity. NLRB v. Enterprise Ass'n of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Machine & General Pipefitters, Local Union No. 638, 429 U.S. 507 (1977).

We find it impossible to see how a result that at the very least encourages unnecessary litigation and adds impediments to the collective bargaining process could be in the interests of national labor policy or sound judicial administration. The preservation of the right to raise illegality defenses assures that disputes will be resolved when and if they do arise, by bodies that are competent to resolve them, on terms that are fair to the parties to the contract.

CONCLUSION

The judgment of the United States Court of Appeals for the District of Columbia Circuit should be reversed.

Respectfully submitted,

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